2010

Al Cea v. ATC Marketing, LLC d/b/a American Timbercraft : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

AL CEA, an individual; and LAURA CEA, an individual, Plaintiffs/Appellants, vs. ATC MARKETING, LLC d/b/a AMERICAN TIMBERCRAFT, a Utah limited liability company; 18 PLUS, LLC, a Utah limited liability company; MODULAR MANUFACTURING, LLC, a Utah limited liability company; INVESTORS COLLABORATIVE, LLC, a Utah limited liability company; JOHN A NIPKO, individually and doing business as ATC MARKETING, LLC d/b/a AMERICAN TIMBERCRAFT; MIKE NYBORG, individually and doing business as ATC MARKETING, LLC d/b/a American TIMBERCRAFT; JEFFREY PEACOCK, individually and doing business as MODULAR MANUFACTURING LLC and INVESTORS COLLABORATIVE, LLC; ROGER HOFFMAN, individually and doing business as MODULAR MANUFACTURING, LLC and INVESTORS COLLABORATIVE, LLC; RICK KOERBER, individually and doing business as MODULAR MANUFACTURING, LLC and INVESTORS COLLABORATIVE, LLC; and DOES 1-20, inclusive Defendants/Appellees.	:	Court of Appeals No.: 20100728-CA District Court Case No.: 080901240

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

ON APPEAL FROM A SUMMARY JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH, HONORABLE ERNIE W. JONES

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JURISDICTIONAL STATEMENT

The Court has jurisdiction over this appeal under UTAH CODE ANN. § 78A-4-103(2)(j).

PRELIMINARY STATEMENT REGARDING PARTIES

There are three appellees in this case, defendants Roger Hoffman ("Hoffman"), Modular Manufacturing, LLC ("Modular"), and Investors Collaborative, LLC ("Investors") (collectively the "Appellees"). As indicated in the caption, plaintiffs and appellants Al and Laura Cea (collectively the "Ceas" or "Appellants") sued Appellees and several other defendants. On an interlocutory basis, the Ceas appeal from the trial court's grant of two summary judgment motions filed by Appellees, one filed by Hoffman, and the other filed jointly by Modular and Investors.

STATEMENT OF THE ISSUES

1. Whether the trial court correctly concluded that there were no genuine issues of material facts precluding summary judgment when (i) Appellees' statement of facts in the moving papers were wholly uncontroverted, (ii) Appellants failed to provide relevant admissible evidence contesting Appellees' facts, and (iii) Appellants did not file a Rule 56(f)[1] motion and affidavit indicating that they needed additional discovery.

Preservation Below/Standard of Review. Appellees concur that this issue was preserved below. Summary judgment rulings are reviewed on appeal for correctness.

[1] References to a particular procedural rule, *e.g.*, Rule 56(f), shall refer to the Utah Rules of Civil Procedure, except where otherwise noted.

Pigs Gun Club, Inc. v. Sanpete County, 2002 UT 17, ¶ 7, 42 P.3d 379 ("[I]n reviewing a trial court's grant of summary judgment, 'we consider only whether it correctly applied the law and correctly concluded that no disputed issues of material fact existed.'") (quoting *Surety Underwriters v. E & C Trucking*, 2000 UT 71, ¶ 14, 10 P.3d 338); *Sittner v. Schriever*, 2001 UT App. 99, ¶ 7, 22 P.3d 784 ("We review the trial court's summary judgment rulings for correctness. We consider only whether the trial court correctly applied the law and correctly concluded that no disputed issues of material fact existed.").

2. Whether the trial court correctly applied the governing law and dismissed Appellants' claims for breach of contract as to guaranty when it concluded that the letter at issue was not an enforceable agreement or guaranty because (i) it was too indefinite and uncertain, (ii) there was no consideration for it, and (iii) the letter's express language contemplated future a contract.

Preservation Below/Standard of Review. Appellees concur that this issue was preserved below. Summary judgment rulings are reviewed on appeal for correctness. *Pigs Gun Club*, 2002 UT 17 at ¶ 7 ("[I]n reviewing a trial court's grant of summary judgment, 'we consider only whether it correctly applied the law and correctly concluded that no disputed issues of material fact existed.'") (quoting *Surety Underwriters*, 2000 UT 71 at ¶ 14); *Francisconi v. Union Pac. R.R. Co.* 2001 UT App. 35, ¶ 8, 36 P.3d 999 ("On an appeal from a grant of summary judgment, we review the trial court's legal conclusions for correctness and grant them no deference."); *Sittner*, 2001 UT App. 99 at ¶ 7 ("We review the trial court's summary judgment rulings for correctness. We

consider only whether the trial court correctly applied the law and correctly concluded that no disputed issues of material fact existed.").

3. Whether the trial court correctly applied the governing law and dismissed Appellants' claims for fraud and negligent misrepresentation as to guaranty because (i) the letter was not an enforceable guaranty or agreement, (ii) Appellants did not rely on the letter or suffer any resulting damages, and (iii) neither Hoffman nor Investors made any representations to the Ceas at any time.

Preservation Below/Standard of Review. Appellees concur that this issue was preserved below. Summary judgment rulings are reviewed on appeal for correctness. *Pigs Gun Club*, 2002 UT 17 at ¶ 7 ("[I]n reviewing a trial court's grant of summary judgment, 'we consider only whether it correctly applied the law and correctly concluded that no disputed issues of material fact existed.'") (quoting *Surety Underwriters*, 2000 UT 71 at ¶ 14); *Francisconi*, 2001 UT App. 35 at ¶ 8 ("On an appeal from a grant of summary judgment, we review the trial court's legal conclusions for correctness and grant them no deference."); *Sittner*, 2001 UT App. 99 at ¶ 7 ("We review the trial court's summary judgment rulings for correctness. We consider only whether the trial court correctly applied the law and correctly concluded that no disputed issues of material fact existed.").

4. Whether the trial court's two memorandum decisions granting Hoffman's and Modular and Investors' motions for summary judgment satisfied Rules 52(a) and 56(d) when (i) they contained a brief written statement of the

grounds for trial court's decisions, (ii) the motions adjudicated all claims against the Appellees, and (iii) any error would be non-prejudicial to the Appellants.

Failure to Argue Issue on Appeal/Standard of Review. This issue was not properly raised in the trial court, whether by motion, objection or otherwise and thus is waived on appeal. *Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, ¶ 20, 163 P.3d 615; *West One Bank. v. Life Ins. Co.*, 887 P.2d 880, 882 (Utah Ct. App. 1994) ("To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits."). Whether the trial court complied with the Utah Rules of Civil is a question of law that is reviewed for correctness. *See Williams v. Bench*, 2008 UT App. 306, ¶ 8, 193 P.3d 640; *Francisconi*, 2001 UT App. 35 at ¶ 8 ("On an appeal from a grant of summary judgment, we review the trial court's legal conclusions for correctness and grant them no deference."); *Carrier v. Pro-Tech Restoration*, 909 P.2d 271, 272 (Utah Ct. App. 1995) (holding interpretation of the Utah Rules of Civil Procedure is generally a question of law, which is reviewed on appeal for correctness).

5. Whether the trial court's entry of the two orders constitutes reversible error under Rule 7(f)(2) when (i) the orders conformed to the memorandum decisions; (ii) Rule 7(f)(2) is directed to counsel (and not to the trial court) as the process of submitting proposed orders; and (iii) Appellants filed their objections to the proposed orders, the trial court considered the Appellants' objections, and the trial court struck portions of the orders before it signed them.

Preservation Below/Standard of Review. Appellees concur that this issue was preserved below. Whether the trial court complied with the Utah Rules of Civil is a question of law that is reviewed for correctness. *See Williams*, 2008 UT App. 306 at ¶ 8; *Francisconi*, 2001 UT App. 35 at ¶ 8 ("On an appeal from a grant of summary judgment, we review the trial court's legal conclusions for correctness and grant them no deference."); *Carrier*, 909 P.2d at 272 (holding interpretation of the Utah Rules of Civil Procedure is generally a question of law, which is reviewed on appeal for correctness).

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

This dispute arose out of the Ceas's attempted purchase of a modular home from defendant ATC Marketing, LLC ("ATC"), who was doing business as American TimberCraft. On about June 7, 2006, the Ceas purportedly paid ATC $172,112 as a deposit toward a modular home pursuant to a Purchase Agreement with ATC (the "ATC Agreement"). Thereafter, ATC fell into financial difficulty and closed its doors.

On about November 12, 2006, Modular acquired many of the assets of ATC, including the trade name of American TimberCraft. Afterward, Modular sent the Ceas a one-page letter on its letterhead (the "Letter") that is central to all three of the causes of action pled against the Appellees. Appellants claim this Letter is a "guaranty" by not only Modular, but also by Hoffman and Investors, neither of whom signed the Letter. (A copy of the Letter is attached hereto as Appendix 1 ("App. 1").) This Letter indicated that if the Ceas wanted to go forward, Modular "will be issuing new contracts . . . in order to complete and give [the Ceas] the assurance of a valid contract for performance."

(App. 1.) The Letter further indicated that there would be some "modifications to terms and payments schedules." (*Id.*). Other than this Letter, there were no other communications from Modular. Moreover, Hoffman and Investors never contracted, communicated, or had any dealings with the Ceas whatsoever.

II. STATEMENT OF CLAIMS PLED AGAINST APPELLEES.

On or about February 27, 2008,[2] the Ceas filed their Complaint against, among several others, Modular, Investors, and Hoffman. The first six causes of action make no allegations against Modular, Investors, and Hoffman and relate solely to the other defendants. The only three causes of action against the Appellees are the seventh, eighth, and ninth, which the Ceas identify as "breach of contract as to guaranty," "fraud as to guaranty," and "misrepresentation as to guaranty." As defined in the Complaint, the supposed "guaranty" central to each of these three claims consists of only the Letter. Thus, these three causes of action alone define and limit the scope of the lawsuit against the Appellees, including the summary judgment motions, the memorandum decisions and orders dismissing the causes of action, and this appeal.

III. COURSE OF PROCEEDINGS.

The following statement sets forth the course of proceedings relevant to this appeal. In order for this Court to fully understand the claims and issues actually before the trial court at summary judgment, and hence the issues on this appeal, it is necessary to

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[2] The Ceas actually first brought these claims against Modular, Investors, Hoffman and several other defendants, when they improperly filed Case No. SC 21434 in the Placer County Superior Court in California. That case was dismissed without prejudice. (R. 1521, 1669.)

set forth much of the procedural posture and relevant history beyond the summary judgment papers, including (i) that the trial court previously denied the Ceas's motion to amend the complaint as untimely, and the Ceas did not appeal that decision; (ii) that the Ceas did not file a Rule 56(f) motion in opposing the summary judgment motions; (iii) that the Ceas did not move to compel discovery until after the summary judgment motions had been submitted for decision; and (iv) the Ceas did not submit the motion to compel until a week after the summary judgment hearing.

A. The Ceas File their Complaint Against Multiple Defendants.

On February 27, 2008, Appellees filed their Complaint against ATC, 18 Plus, LLC ("18 Plus") Modular, Investors, John A. Nipko ("Nipko"), Mike Nyborg ("Nyborg"), Jeffrey Peacock ("Peacock"), Rick Koerber ("Koerber"), and Hoffman. (R. 1-50.) The Complaint alleged a total of nine claims for relief against the various defendants. (R. 6-21.) Specifically, against the Appellees, the Complaints alleged only three claims for relief: "Breach of Contract as to Guaranty," "Fraud as to Guaranty," and "Negligent Misrepresentation as to Guaranty." (R. 13-16.) As set forth above, the "Guaranty" identified in the Complaint refers to an undated letter to the Ceas on Modular's letterhead, attached to the Complaint as Exhibit D. (R. 13-16, 42; App. 1)

B. The Ceas Wait more than a Year to Hold the Attorneys' Planning Meeting and Commence Formal Discovery Against Appellees.

A year later after the Complaint was filed, on March 5, 2009 the Court signed and entered the parties' stipulated scheduling order as the operative scheduling order (the "Scheduling Order") to govern the case management and deadlines of the case.

(R. 462-78.) According to the Scheduling Order, "[t]he deadline for amending pleadings shall be April 8, 2009." (R. 462.) Furthermore, under the Scheduling Order, "[u]nless otherwise stipulated by the Parties or ordered by the Court, all fact discovery shall be completed on or before August 31, 2008." (R. 463.)

On July 5, 2009, sixteen months after filing the Complaint and three months after the deadline to amend the pleadings, the Ceas first commenced formal discovery on Appellees by serving their First Set of Interrogatories and Requests for Production of Documents to Hoffman, Modular, and Investors (the "Discovery Requests"). (R. 606-07.)

After the initial discovery deadline had passed and at the Ceas's initiation, the parties jointly moved to amend the scheduling order on or about October 9, 2009 to give the Ceas an additional two (2) months of discovery. (R. 701-14.) Pursuant to the stipulation, the parties agreed only "to the extending of the fact discovery and dispositive motion deadlines as set forth in the [Proposed] Order Amending Stipulated Scheduling Order (the "Amended Scheduling Order"). (R. 703.) Under the Amended Scheduling Order, the trial court ordered:

> Unless otherwise stipulated by the Parties or ordered by the Court, all fact discovery shall be complete on or before December 1, 2009.
>
> The deadline for filing dispositive motions shall be December 7, 2009.
>
> The Case should be ready for trial by January 2010.

(R. 716.) No revisions were stipulated or ordered regarding the deadline for amending pleadings, which had passed six months previously. (R. 701-18.)

C. Appellees Moved for Summary Judgment at the Close of Discovery, and Appellants did not File a Rule 56(f) Motion in Opposition.

In December 2009, after the close of fact discovery as extended, Hoffman filed a motion for summary judgment as to all three causes of action alleged against him in the Complaint. (R. 730-33.) At the same time, Modular and Investors filed a summary judgment as to all three causes of action alleged against them in the Complaint. (R. 753-56.) (The two summary judgments motions are collectively referred to as the "Motions.") The Motions were supported by two memoranda and the affidavit of Hoffman. (R. 734-52, 757-79.)

The Ceas filed their opposition memoranda to the Motions on January 14, 2010. (R. 829-1033.) A week later, the Ceas filed amended opposition memoranda to the Motions. (R. 1034-1237.) The Ceas did not file a motion and affidavit under Rule 56(f) in conjunction with either set of their opposition memoranda or at any other time.

On February 5, 2010, Appellees filed their reply memoranda in further support of their Motions. (R. 1238-68.) On March 1, 2010, the Appellees filed a Request to Submit for Decision on their two Motions. (R. 1434-37.) Hearing on the Motions was set for June 22, 2010 and later rescheduled for July 13, 2010. (R. 1539-40, 1676.)

D. The Court Denied Appellants' Belatedly Filed Motion to Amend to Add Third Party Beneficiary Claims, and Appellants did not Appeal.

Two weeks after the Motions had been submitted for decision and almost a year after the deadline to amend pleadings under the Scheduling Order, on March 12, 2010, the Ceas moved to amend their Complaint to add an additional claim against the

Appellees. (R. 1438-40.) Specifically, the Ceas moved the trial court for leave to "allow them to amend their complaint to include a third-party beneficiary claim against [Appellees]." (R. 1443-44.)[3]

Appellees opposed the motion to amend, (R. 1518-38), and after it was fully briefed, on or about May 24, 2010 the trial court denied the Ceas's motion to amend as untimely. (R. 1667-71.) Specifically, the trial court reasoned that because discovery had closed, the deadline to amend had "long since lapsed," and there were pending dispositive motions, "allow[ing] an amendment of the complaint would be a serious setback toward finality." (R. 1669.) Critically, the Ceas did not appeal, nor seek leave to do so, from the trial court's denial of their motion to amend.

E. Appellants' Motion to Compel is Submitted after Summary Judgment.

On March 31, 2010, nearly a month after the summary judgment Motions had been submitted, the Ceas filed a Motion to Compel the Appellees to more fully respond to the Discovery Requests. (R. 1499-1538.) The Appellees opposed the Motion to Compel on April 16, 2010, (R. 1592-1649); and the Ceas filed their reply memorandum on April 29, 2010. (R. 1660-66.) Notably, the Ceas did not file a request to submit the motion to compel for decision until July 20, 2010, a week after the trial court had heard

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[3] In their opposition to the motion to amend, the Appellees pointed out the procedural error that the Ceas failed to attach a copy of the proposed amended complaint, as required by the Utah Supreme Court in *Holmes Dev., LLC v. Cook*, 2002 UT 38, ¶¶ 57-58, 48 P.3d 895. (R. 1438-99.) The Appellees stipulated to allow the Ceas an opportunity to cure this procedural defect "by circulating a proposed order containing the language they seek to include in an amended complaint by attaching the proposed order to their reply memorandum in further support of their Motion." (R. 1569.) However, it does not appear that the proposed order with the precise language of the amendment was filed or otherwise made it into the record. (*See* R. 1581-91, 1652-56.)

oral arguments on the summary judgment Motions and had taken the determination of these issues under advisement. (R. 1676, 1677-79, 1847 p. 47.) Oral argument on the motion to compel was set for October 26, 2010 and then rescheduled to November 23, 2010. (R. 1682-83, 1727-28.)

F. The Court Correctly Issued the Memorandum Decisions and Orders.

On August 19, 2010, the Court issued two memorandum decisions (the "Memorandum Decisions") granting the Motions filed by Hoffman and by Modular and Investors, respectively. (R. 1685-87, 1688-90.) Per the Memorandum Decisions, the Appellees prepared and circulated two proposed orders granting the Motions. (R. 1733-37, 1738-42.) The Ceas objected to the proposed orders. (R. 1694-1705.) The Appellees filed a response to the Appellants' objections, which was all submitted for decision under Rule 7(f)(2). (R. 1706-18, 1729-33.) After considering the objections of the Ceas and the Appellees' response, the trial court struck several portions of the proposed orders and then signed them (the "Orders"). (R. 1733-37, 1738-42.)

On September 13, 2010, the Ceas filed their Notice of Filing of Petition for Permission to Appeal regarding the Orders. (R. 1719-24.) At a hearing on November 23, 2010, the trial court struck the motion to compel without prejudice. (R. 1841-44.)

IV. STATEMENT OF FACTS.

A. The Total Connection between the Appellants and Appellees.

On or about June 7, 2006, the Ceas entered into the ATC Agreement with defendant ATC for the construction of a modular log structure the (the "Modular Home")

on the Ceas's property in Gold Run, California. (R. 737, 760.) ATC did not and has not commenced construction of the Modular Home. (R. 737, 760.)

Sometime after November 12, 2006, Modular sent the Letter to some of ATC's former customers, including the Ceas, stating that "ATC Marking, LLC, the owner of American TimberCraft has ceased operations effective November 12, 2006 and has liquidated all company assets." (R. 737, 760.) The Letter provides as follows:

> As you may be aware, ATC Marketing, LLC, the owner of American TimberCraft has ceased operations effective November 12, 2006 and has liquidated all company assets. While this move was a difficult decision for ATC, financial reasons dictated that this route was necessary.
>
> As a customer of ATC Marketing we wanted to take a moment and explain how this situation affects you. Obviously with the dissolution and liquidation of ATC Marketing, the company is no longer capable of completing or performing on its contract with you. However, all is not lost.
>
> Modular Manufacturing, LLC has acquired the bulk of ATC assets including plan equipment, all proprietary property and the trade name of "American TimberCraft." Although Modular Manufacturing did not purchase ATC Marketing itself as part of the asset acquisitions, Modular agreed to complete all work in progress, including orders for which deposits have been taken (even if no physical work has commenced). Therefore if you had an order with ATC Marketing, Modular has agreed to complete the work on your home for the previously agreed price, even though it did not acquire your actual contract from ATC Marketing.
>
> At this point in time we (as Modular) will be issuing new contracts for your home construction (regardless of what stage of construction it may be in) in order to complete and give you the assurance of a valid [c]ontract for performance. In lieu of a new contract we will be willing to pay you whatever deposits or payments you [sic] made to ATC Marketing for your home should you decide that you would prefer to cancel and just walk away. . . .
>
> [If] you decide that you would like to proceed, enter into a new contract and have your home completed, there [are s]ome minor modifications to terms

and payment schedules. However the specifications for the home itself [will not] change nor will the price.

(R. 737-38, 760-71, 737-77; App. 1 (emphasis added).)

The Ceas did not provide any consideration, value, or promises in exchange for the Letter. (R. 738, 761, 777.) The Letter was sent gratuitously by Modular and for the intended purpose of Modular entering into a future contract with the Ceas and others. (R. 738, 761, 777.)

Although the Letter contemplated the possibility of a future agreement between them, Modular and the Ceas never entered into a contract, including any sort of agreement with respect to the building of the Modular Home or a reimbursement of any deposit that the Ceas previously paid to any of the other defendants. (R. 738, 761, 777.)

Moreover, Hoffman and Investors did not make, execute or deliver the Letter to the Ceas. (R. 738, 761, 777.) Similarly, Hoffman and Investors never entered into any sort agreement, contract, or understanding with the Ceas at any time. (R. 739, 761, 777.) Hoffman and Investors have not made any statements, representations, or averments to the Ceas. (R. 739, 762, 777.) In fact, Hoffman and Investors have never communicated, in any way whatsoever, with the Ceas. (R. 739, 762, 777.) Investors and Hoffman did not sign or prepare the Letter, and the Letter does not appear on Hoffman's or Investors's personal letterhead. (R. 739, 762, 777-78.)

B. The Relationship among the Appellees.

Roger Hoffman is an individual shareholder in The Nexus Group, Inc. ("Nexus"). (R. 739, 776.) Nexus holds a fifty percent (50%) ownership interest in Investors.

(R. 739, 777.) FranklinSquires Investments, L.L.C. ("FranklinSquires") holds the remaining fifty percent (50%) ownership interest in Investors. (R. 776.) Investors is a manager-managed Utah limited liability company. (R. 776.) The current manager of Investors is The Ralen Corporation ("Ralen"). (R. 776.) Hoffman is an officer of Ralen. (R. 739, 776.)

Investors holds a fifty-one percent (51%) membership in Modular. (R. 739, 776.) Timber Ridge Properties, L.L.C. ("Timber Ridge") holds the remaining forty-nine percent (49%) ownership interest in Modular. (R. 776.) Modular is a member-managed Utah limited liability company. (R. 776.)

SUMMARY OF THE ARGUMENT

The Ceas's brief raises several issues but not one plausible basis for reversal:

1. The trial correct correctly determined that there is no genuine issue of material fact that would preclude summary judgment. The Appellants did not controvert, by admissible evidence or otherwise, the statements of facts in the Appellees' Motions. And the facts raised by the Appellants are not material to the three causes of action raised in the Complaint, *i.e.*, Appellants' facts relate to claims not pled. The purported issues of fact, cited by the Appellants, boil down to a disagreement with the trial court's conclusions of law. Furthermore, Appellants waived their argument that they needed additional discovery to controvert the Appellees' facts because they did not file a Rule 56(f) motion and affidavit in conjunction with their opposition, and the Appellants unnecessarily waited until after the hearing on the summary judgment motions before submitting their motion to compel.

2. The trial court correctly concluded that the Letter was not an enforceable guaranty agreement because it was too indefinite and uncertain in its terms and because it contemplated a future contract. The Letter stated that if the Ceas were to go forward, then there would be "modifications to payment terms and schedules" and—on two separate occasions—stated that there would need to be "new contracts." Moreover, there is no basis to suggest that Investors or Hoffman guaranteed any obligation to the Appellants because Investors and Hoffman did not sign the Letter, and, under the statute of frauds, there must be a writing signed by the party to charged for a valid guarantee.

3. The trial court correctly concluded that the Appellees were not liable for fraud or negligent misrepresentation because the Appellants did not provide any evidence of such at the summary judgment proceeding, Appellants did not rely or change their position to their determinant in response to the Letter, and the Appellants did not suffer any damages as a result of receiving the Letter (all of their damages occurred and were fixed prior to Modular's sending the letter). Furthermore, since neither Hoffman nor Investors ever made any representations to the Ceas, they could not be liable for fraud or negligent misrepresentation as a matter of law.

4. The trial court complied with and satisfied the requirements of Rules 52(a) and 56(d) in issuing its Memorandum Decisions. Rule 52(a) only requires a "brief written statement" explaining the grounds for the court's decision and does not mandate findings of fact for summary judgment motions. Furthermore, it was not practicable for the trial court to provide a statement of the material facts that are not substantially controverted in this case because the summary judgment decided all of the causes of

action against the Appellees, and the facts are unique to these defendants. Thus, they will not be at issue at trial against the remaining defendants. To the extent the trial court should have still provided such a statement, it is not a prejudicial or reversible error.

5. The Orders, as signed by the trial court, conform to the Memorandum Decisions. Rule 7(f)(2) is an instruction to counsel as to the process for submitting proposed orders and objections to the trial court. It is not a basis for reversal. The trial court considered the Appellants' objections and the Appellees' response, struck portions of the proposed orders, and adopted the other statements as the final adjudication of the Motions and the Appellants' three causes of action against the Appellees.

LEGAL STANDARD GOVERNING SUMMARY JUDGMENT

The trial court correctly determined that there were no genuine issues of fact and that Appellees were entitled to judgment as a matter of law on the three claims pled against them in the Complaint. "A trial court may properly grant summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Snyder v. Murray City Corp.*, 2003 UT 13, ¶ 16, 73 P.3d 325 (quoting *WebBank v. Am. Gen. Annuity Serv. Corp.*, 2002 UT 88, P 10, 54 P.3d 1139; UTAH R. CIV. P. 56(c) (2011). Summary judgment is not precluded simply because some facts remain in dispute, "but only when a material fact is genuinely controverted." *Id.*; *Wheeler v. Mann*, 763 P.2d 758, 759 (Utah 1988) (holding that summary judgment is not precluded simply because there are conflicts as to other factual issues).

"The propriety of a trial court's grant of summary judgment is a question of law." *Snyder*, 2003 UT 13 at ¶ 16 (citing *WebBank*, 2002 UT 88 at ¶ 10). "In deciding whether

summary judgment was appropriate, [the appellate court] need review only whether the trial court erred in applying the relevant law and whether a material fact was in dispute." *Id.* Therefore, this Court should "review the trial court's legal conclusions for correctness, according them no deference." *Id.* In so doing, this Court should confirm that the trial court correctly ruled that there were no genuine issues as to any material facts, conclude that the trial court correctly applied the law and ruled that summary judgment in favor of Appellees was appropriate, and hold that Memorandum Decisions and Orders were properly issued and entered.

ARGUMENT

Months before the Appellants had ever heard of Hoffman, Investors, or Modular, the Ceas executed the ATC Agreement with ATC and paid it (or defendant 18 Plus) a substantial amount of money; and, unfortunately, the ATC Agreement fell into default and the business went under. At that point, all of the Ceas's damages were fixed against and limited to ATC (or 18 Plus) as the contracting entity.

When they determined to file a lawsuit, the Ceas incredulously overreached and ensnared those who had nothing to do with the money that they had already lost. The Ceas named Modular—a separate and unrelated entity to ATC or 18 Plus—in the lawsuit because Modular acquired some assets of ATC and then gratuitously sent the Letter to the Ceas about entering into a future contract. To create a claim where one does not exist, the Ceas incorrectly call the Letter a "guaranty," and it is the core of the three claims against the Appellees.

Moreover, the Ceas shamelessly entangled Hoffman and Investors in this matter, even though they did not sign the Letter or make any representations to the Ceas whatsoever. Without pleading alter ego or piercing the corporate veil in the Complaint, the Ceas's case wholly disregards fundamental and codified principles of limited liability and corporate structure, and implicitly seeks to impose liability on one of Modular's members (*i.e.*, Investors) and on an officer of the corporation acting as the manager of Investors (*i.e.*, Hoffman) when they did nothing improper and any actions were solely within the scope of their managerial/membership duties. If there were any wrong doing by any of the Appellees, which there is not, it is limited to Modular who sent the Letter.

The trial court correctly granted summary judgment in favor of the Appellees. The few material facts in this matter are not in dispute, and the Appellants did not file a Rule 56(f) motion, indicating that they needed additional discovery to controvert the facts or to substantiate their claims. Thus, as a matter of law, the trial court properly ruled the Letter was not an enforceable guaranty because it was indefinite and uncertain, contemplated future contracts, and lacked any consideration. Likewise, the trial court rightfully ruled that there was no fraud or negligent misrepresentation when the Appellants did not provide any evidence of such, they did not rely on the Letter or suffer any resulting damages, and neither Hoffman nor Investors ever made any representation to the Ceas.

The Ceas may have legitimate breach of contract and related claims against some of the other defendants; however, the trial court justly dismissed the Ceas' claims against

Hoffman, Investors, and Modular as a matter of law. The summary judgment rulings were correct and should be affirmed on appeal.

I. THE SCOPE OF THE SUMMARY JUDGMENT MOTIONS AND THIS APPEAL IS LIMITED TO ONLY THE THREE CAUSES OF ACTION PLED AGAINST THE APPELLEES: BREACH OF GUARANTY, FRAUD AS TO GUARANTY, AND MISREPRESENTATION AS TO GUARANTY.

The trial court did not fall into the Appellants' attempted trap to look outside of the bounds of the lawsuit. In the Complaint, there are only three causes of action pled against the Appellees, which define the scope of the summary judgment proceedings and this appeal. (*See* R. 1-21.) These are "breach of contract as to guaranty," "fraud as to guaranty," and negligent misrepresentation as to guaranty." (R. 13-16.) The Complaint expressly defines the guaranty as the Letter to the Ceas on Modular's letterhead, attached to the Complaint. (R. 13-16, 42; App. 1.) There are no other documents at issue. The causes of action against the Appellees pled only that the Letter "guaranty" gives rise to contract, fraud and misrepresentation liability on the part of all three Appellees. These claims, and these claims alone, constitute the scope of the Complaint allegations to which Appellees were exposed, and to which they moved for summary judgment.

Throughout their brief, the Ceas repeatedly refer to or argue matters that were not pled in the Complaint, were not before the trial court on summary judgment, and consequently, are not before this Court on appeal. (*E.g.* Appellants' Br. ("Applts' Br.") at 1, 3, 4, 10-16.) For example, though argued on appeal, the Ceas have not raised a claim in the Complaint for breach of contract as a third-party beneficiary under the acquisition documents between Modular and ATC. (*Compare* R. 1-47, *with* Applts' Br.

at 1, 10-13 (arguing the issue on appeal as whether Appellees "assumed the responsibilities of defendants/respondent ATC Marketing, LLC").) Even though argued improperly in summary judgment and on appeal, the Ceas did not plead any claim that any distributions by Modular or Investors violated UTAH CODE ANN. § 48-2d-1005(1). (*Compare* R. 1-47, *with* Applts' Br. at 11-13.) Furthermore, the Ceas have not raised a claim for alter ego or piercing the corporate veil. (R. 1-47.) These issues are not to be found anywhere in the Complaint, nor were they before the trial court on summary judgment. (R. 1-47, 730-74.)

After the Motions had been filed, fully briefed and submitted for decision, the Ceas moved for leave to amend their Complaint, nearly a year after the deadline to amend. (R. 1438-40.) On May 24, 2010, the trial court denied Ceas's motion to amend as untimely. (R. 1667-71). The Ceas did not appeal from this decision, and it is not now before the Court. Therefore, the primary issue before the trial court and on appeal is whether the Letter constitutes a guaranty agreement by any of the Appellees, and if so, whether any of the Appellees should be liable for fraud or negligent misrepresentation with respect to the Letter. (R. 730-774.) This Court should not be lured into analyzing arguments that were not before the trial court and therefore cannot be on appeal. The trial court correctly ignored these extraneous issues that were wholly unrelated to the causes of action pled against the Appellees.

II. THE APPELLANTS DID NOT RAISE ANY GENUINE ISSUES OF FACT.

A. The Material Facts for Summary Judgment are Undisputed.

The trial correct correctly ruled that the few material facts are not in dispute. In moving for summary judgment, the Appellees relied upon the Ceas's admissions and Hoffman's affidavit. (R. 737-39, 760-62.) The Appellants did not controvert the short statements set forth in Appellees' Statement of Facts. (R. 833-834, 939, 1039, 1138-39.) "Each of the facts set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party." UTAH R. CIV. P. 7(c)(3)(A). In support of Modular/Investors' motion for summary judgment, the Appellees set forth the following eighteen uncontroversial paragraphs in their Statement of Undisputed Facts (original citations included for the Court's reference):

1. On or about June 7, 2006, the Plaintiffs entered into a certain Purchase Agreement (the "Agreement") with Defendant ATC Marketing, L.L.C. dba American TimberCraft ("ATC") for the construction a modular log structure the (the "Modular Home") on the Plaintiffs' property in Gold Run, California. (Compl. ¶¶ 13-14.)

2. ATC did not and has not commenced construction of the Modular Home. (Compl. ¶ 15.)

3. Sometime after November 12, 2006, Modular sent a letter (the "Letter") to some of ATC's former customers, including the Plaintiffs, stating that "ATC Marking, LLC, the owner of American TimberCraft has ceased operations effective November 12, 2006 and has liquidated all

company assets." A true and correct copy of the Letter is attached hereto as "Exhibit A." (*See* Affidavit of Roger Hoffman, dated Dec. 18, 2009 (hereinafter "Hoffman Aff."),¶ 8.)

4. The Letter provides as follows:

> As a customer of ATC Marketing we wanted to take a moment and explain how this situation affects you. Obviously with the dissolution and liquidation of ATC Marketing, the company is no longer capable of completing or performing on its contract with you. However, all is not lost.
>
> Modular Manufacturing, LLC has acquired the bulk of ATC assets including plan equipment, all proprietary property and the trade name of "American TimberCraft." Although Modular Manufacturing did not purchase ATC Marketing itself as part of the asset acquisitions, Modular agreed to complete all work in progress, including orders for which deposits have been taken (even if no physical work has commenced). Therefore if you had an order with ATC Marketing, Modular has agreed to complete the work on your home for the previously agreed price, even though it did not acquire your actual contract from ATC Marketing.
>
> At this point in time we (as Modular) will be issuing new contracts for your home construction (regardless of what stage of construction it may be in) in order to complete and give you the assurance of a valid [c]ontract for performance. In lieu of a new contract we will be willing to pay you whatever deposits or payments you [sic] made to ATC Marketing for your home should you decide that you would prefer to cancel and just walk away. . . .
>
> [If] you decide that you would like to proceed, enter into a new contract and have your home completed, there [are s]ome minor modifications to terms and payment schedules. However the specifications for the home itself [will not] change nor will the price.

(Ex. "A" (Emphases added).)

5. The Plaintiffs did not provide any consideration, value, or promises in exchange for the Letter. The Letter was sent gratuitously and for the

intended purpose of Modular entering into a future contract with the Plaintiffs and others. (Hoffman Aff. ¶ 9.)

6. Although the Letter contemplated the possibility of a future agreement with the Ceas, Modular and the Plaintiffs never actually entered into a contract, including any sort of agreement with respect to the building of the Modular Home or a reimbursement of any deposit that the Ceas previously paid to any of the other defendants. (Hoffman Aff. ¶ 10.)

7. Investors did not make, execute or deliver the Letter to the Plaintiffs. (Hoffman Aff. ¶ 11.)

8. Similarly, Investors never entered into any sort agreement, contract, or understanding with the Plaintiffs at any time. (Hoffman Aff. ¶ 12.)

9. Investors has not made any statements, representations, or averments to the Plaintiffs. In fact, Investors has never communicated, in any way, with the Plaintiffs. (Hoffman Aff. ¶ 15.)

10. Investors did not sign or prepare the Letter, and the Letter does not appear on Investors's letterhead. (Hoffman Aff. ¶ 16.)

11. Investors' relationship to Modular is as a fifty-one percent (51%) member of Modular. (Hoffman Aff. ¶¶ 2-5)

(R. 760-62.)

For the Hoffman summary judgment motion, the Statement of Undisputed Material Facts was identical for paragraphs 1 through 6. (*Compare* R. 737-39, with 760-

62.) In addition, Hoffman's motion had the following facts (original citations and numbering included):

6. Although the Letter contemplated the possibility of a future agreement with the Ceas, Modular and the Plaintiffs never actually entered into a contract, including any sort of agreement with respect to the building of the Modular Home or a reimbursement of any deposit that the Ceas previously paid to any of the other defendants. (Hoffman Aff. ¶ 10.)

7. Hoffman did not make, execute or deliver the Letter to the Plaintiffs. (Hoffman Aff. ¶ 11.)

8. Similarly, Hoffman never entered into any sort agreement, contract, or understanding with the Plaintiffs at any time. (Hoffman Aff. ¶ 12.)

9. Hoffman has not made any statements, representations, or averments to the Plaintiffs. In fact, Hoffman has never communicated, in any way, with the Plaintiffs. (Hoffman Aff. ¶ 13.)

10. Hoffman did not sign or prepare the Letter, and the Letter does not appear on Hoffman's letterhead. (Hoffman Aff. ¶ 14.)

11. Hoffman was never an employee, member, manager, owner or other principal of Modular, ATC or 18 Plus. (Hoffman Aff. ¶ 17.)

12. Hoffman's relationship to Modular is two-fold. First, Hoffman is a shareholder of The Nexus Group, Inc., which is a fifty percent (50%) member of Investors Collaborative, LLC, which is a fifty-one percent (51%) member of Modular. Second, Hoffman is the Treasurer of The

Ralen Corporation, which is the Manager of Investors Collaborative, LLC, which is a member of Modular. (Hoffman Aff. ¶¶ 2-5.)

(R. 737-39.)

As this Court can appreciate in compared to other summary judgment motions, the few facts in this case are simple and straightforward. They are not convoluted, controversial, or complicated.

In their Response to Statement of Undisputed Material Facts in their opposition memorandum relative to the Modular/Investors motion for summary judgment (including the amended opposition), Appellants entire response was as follows:

> Plaintiffs dispute the statements contained in Paragraphs 5 and 6 of Defendant Modular's Memorandum. The statements are legal conclusion and may not form the basis for a summary judgment.
>
> Plaintiffs also dispute the attempt to characterize Defendant [Investors] as a passive party that had no hand in the subject matter of this action. *See* ¶¶ 7-11 of Modular Mem. Defendant [Investors] states that its "relationship to Modular is a fifty-one percent (51%) member". *Id.* at ¶ 11. Defendant [Investors] also testified that it was actively involved in the acquisition of ACT and management of Defendant Modular. Defendant [Investors] authorized the drafting and delivery of the Modular Letter to Plaintiffs. *See* Hoffman Aff., ¶¶ 2-6; Ex. "A", Summary No(s) 10 and 20 (Defendant Hoffman testifying that Defendant IC had a controlling membership interest and that Defendant Modular was member-managed). The statements contained in Paragraphs 7 through 10 are legal conclusions and may not form the basis for a summary judgment.

(R. 833-834, 1138-39.) The Appellants' Response to Statement of Undisputed Facts in their original and amended opposition to the Hoffman motion for summary judgment is essentially a cut-and-paste from the other oppositions, except that Investors is replaced with Hoffman, and Appellants contend that "[t]he statements contained in Paragraphs 7

through 12 are legal conclusions and may not form the basis for a summary judgment." (*Compare* R. 939, 1039, *with* R. 833-34, 1138-39.)

These responses do not controvert the facts set forth in the moving memoranda. Further highlighting that there is not dispute as to the facts, the Appellants completely failed to comply with Rule 7(c)(3)(B), which requires that "[a] memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted." UTAH R. CIV. P. 7(c)(3)(B). Appellants were also required to "provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials." *Id.* They did not do it. Accordingly, the Appellees' statements of facts are deemed admitted. *USA Power, LLC v. PacifiCorp*, 2010 UT 31, ¶ 30, 235 P.3d 749; (holding that under Rule (7)(c)(3) the "trial judge therefore has no discretion in deeming facts admitted unless controverted"); *see also Bluffdale City v. Smith*, 2007 UT App. 25, ¶ 11, 156 P.3d 175 (failing to controvert the facts is deemed an admission for summary judgment); UTAH R. CIV. P. 7(c)(3)(A) (facts are deemed admitted unless controverted).

In their opposition memoranda, the Ceas did provide their own statement of Undisputed Material Facts. (R. 830-33, 935-39, 1035-1039, 1135-38.) Many of the "facts" were bald allegations, unsupported by affidavit, deposition testimony, or other admissible evidence. (R. 830-33, 935-39, 1035-1039, 1135-38.) In fact, the Ceas cite to Hoffman's supporting memorandum for the fact that they had paid $172,112 as a deposit, and the Ceas do not cite anything for their statement that their money had not been returned to them. (R. 830, 935, 1035, 1135.) Furthermore, those facts that were

supported by deposition testimony relate to the so-called "Acquisition Agreements," including a Work in Progress Buy-Sell Agreement. (R. 830-31, 935-36, 1035-36, 1135-36.) However, these are not "material" facts as they are unrelated Plaintiffs' seventh, eighth, and ninth causes of action, which were the subject of the summary judgment Motions. (*See* R. 730-74.)

B. Appellants Mistakenly Claim that the Facts are in Dispute; however, they really Mean they Disagree with the Court's Conclusions of Law.

Repeatedly in their brief, Appellants erroneously argue that the facts are in dispute and that precludes summary judgment. (*E.g.* Applt's Br. 1-2, 7-8, 10-19.) They cannot overturn summary judgment by calling it a dispute of fact when the facts are really not disputed. (Applts' Br. 1-2, 7-8, 10-19.) Without limitation, no one disputes that Modular sent the Letter on Modular's letterhead, that the Ceas received the Letter, that neither Hoffman nor Investors signed the letter, that—other than the Letter—Modular did not further communicate with the Ceas, and that neither Hoffman nor Investors communicated with the Ceas. (R. 737-39, 760-62, 775-78.)

Moreover the corporate structure, membership, and management of Modular and Investors is also not in dispute. That is, Hoffman is an individual shareholder of Nexus, which is a fifty percent (50%) member of Investors, which is a fifty-one percent (51%) member of Modular. FranklinSquires holds the remaining fifty percent (50%) interest in Investors, and Timber Ridge holds the remaining forty-nine percent (49%) ownership interest in Modular. Modular is a member-managed limited liability company, and

Investors is a manager-managed limited liability company, and the manager of Investors is Ralen, a corporation. Hoffman is an officer for Ralen. (R. 737-39, 760-62, 775-78.)

The Ceas did not offer any admissible evidence to the contrary for any of these facts. (R. 939, 1039, 833-34, 1138-39; *see* UTAH R. CIV. P. 56(e) (requiring the party opposing summary judgment to offer facts "as would be admissible in evidence").) At summary judgment, the Ceas "may not rest upon the mere allegations or denials of the pleadings, but the responsive, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." UTAH R. CIV. P. 56(e).

In their opening brief, the Appellants make five contentions that "[g]enuine issues of material facts exist in this case, making summary judgment improper." (Applts' Br. at 10-19.) "The first genuine issue is whether Hoffman was a mere agent of Modular or whether Hoffman had a more substantial relationship with Modular that would impose personal liability upon him for his actions." (Applts' Br. at 10.)

The Ceas acknowledge that Appellees set forth facts that "Modular never made any distributions, Hoffman never received any distributions from Modular, Hoffman is not a member of Modular, and Hoffman did not assume to act for Modular with respect to the purported distributions." (Applts' Br. at 11.) However, in their brief, the Ceas apparently "contest these facts, arguing that Modular did in fact make distributions, that such distributions were made while Modular was insolvent, and that Hoffman played a substantial role in Modular's decision to make those insolvent distributions" and that "Hoffman is not merely an agent of Modular, but should be held personally liable for his

and Modular's actions as a 'person who assumed to act as a company without complying with the Utah Revised Limited Liability Company Act." (Applts' Br. at 11.)

There are at least two fatal flaws with Appellants' position. Foremost, these are not material facts to the summary judgment. Whether Modular made any distributions, whether Modular was insolvent, and whether Hoffman has a membership interest in Modular, are all irrelevant to the issue of whether the Letter is a guaranty agreement and whether there was fraud or a misrepresentation relating to the Letter. Accordingly, if these facts were in dispute, it has no bearing on whether summary judgment is warranted.

Moreover, the facts are not in dispute. In stating that the Ceas contest these facts, Appellants cite to pages 1040-43 of the Record, which is their argument section of their opposition to the summary judgment. (Applts' Br. at 11.) The argument section is not admissible evidence. The Appellants needed to cite to affidavit or deposition testimony to show that they controvert the Appellees' statement of facts. They did not do so.

Next Appellants contend the second genuine issue of fact is whether the Letter, "constituted one or more offers which were accepted by the Ceas, whether there existed adequate consideration to support the contract, and whether Hoffman may be personally liable for the representations made to the Ceas therein." (Applts' Br. at 13.) Appellants miss the mark. These are not issues of disputed fact. These are legal conclusions.

The trial court concluded as a matter of law that the Letter was not an offer that could be accepted because of its indefiniteness and uncertainty, that there was not adequate consideration to support it, and that Hoffman and Investors were not personally obligated under the Letter. (R. 1685-87, 1688-90.) Examples of questions of fact could

be whether the Letter was ever sent/received, or who signed the Letter. These are not at issue. Rather, it was for the trial court to review and interpret the Letter, determine whether it constituted an offer that could be accepted, whether there was any consideration, and whether Hoffman or Investors agreed to personally answer for the Letter.

As to the their third and fourth contentions, Appellants argue that there is a genuine issue of fact whether Modular became contractually obligated to complete the Ceas's home when Modular acquired ATC's assets, and whether the Letter was indefinite and uncertain in its terms. (Applts' Br. at 15-16.) Again, the Ceas confuse issues of fact with conclusions of law. Whether a contract is reasonably certain and definite to be enforceable is a question of law to be decided by the judge. *See Fitzgerald v. Corbett*, 793 P.2d 356, 358 (Utah 1990) (holding whether a contract is ambiguous because uncertainty in terms is a "question[] of law"); *Covey v. Covey*, 2003 UT App. 380, ¶ 16, 80 P.3d 553 ("Interpretation of the terms of a contract is a question of law.")

Likewise, whether Modular assumed any obligation of ATC is a legal question, and, importantly, it relates to a cause of action for breach of contract as a third party beneficiary—a cause of action that was not before the trial court on summary judgment. (R. 730-774.) The Ceas attempted to raise this in their motion to amend. (R. 1518-38.) But, their motion was denied as untimely, and they chose not to appeal. (R. 1667-71.)

The same applies equally to Appellants' fifth assertion that there were issues of fact as to whether there was any fraud or negligent misrepresentation. (Applts' Br. at 17-18.) Appellants may disagree with the trial court's conclusion that there was no

fraud or misrepresentation, but there is no dispute that neither Hoffman nor Investors made any representations to the Ceas, that the Ceas suffered no damages by receiving the Letter, and that the Ceas did not rely on the Letter or alter their position to their detriment—meaning that Ceas could not satisfy the requisite elements. (R. 737-39, 760-62, 775-78.) Appellants bald assertion that they "dispute the factual assertions by Respondents," without any recitation to the record whatsoever, is unavailing. (Applts' Br. at 18.) Again, it is not that the facts are in dispute; rather, it is just that the Ceas wished for a different outcome.

As show above, the Appellants' five so-called "genuine issues of fact" are not disputes of fact at all, and they certainly do not preclude summary judgment. These issues are essentially the conclusions of law properly determined and reached by the trial court. As set forth more fully in Section III, *infra*, to the extent they were before it, the trial court correctly concluded each of those issues in favor the Appellees.

C. If the Appellants Needed Additional Discovery to Controvert the Facts at Summary Judgment, they should have Filed a Rule 56(f) Motion.

Appellants waived any argument that they could not properly controvert Appellees' statement of facts for lack of discovery because they never filed a Rule 56(f) motion in conjunction with their opposition memoranda. Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for the reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order of continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

UTAH R. CIV. P. 56(f). Said another way, "Rule 56(f) allows a party opposing a motion for summary judgment to file an affidavit stating reasons why the party is presently unable to submit evidentiary affidavits in opposition to the moving party's supporting affidavits." *Fenn v. Redmond Venture, Inc.* 2004 UT App. 355, ¶ 16, 101 P.3d 387 (quoting *Crossland Sav. v. Hatch*, 877 P.2d 1241, 1243 (Utah 1994)). Critically, the Appellants did not avail themselves of this option in opposing the Motions.

In their brief, Appellants argue that "fact discovery is incomplete" and "[i]n Utah, '[g]enerally, summary judgment should not be granted if discovery is incomplete since information sought in discovery may create genuine issues of material fact sufficient to defeat the motion.'" (Applts' Br. at 19 (citing *Bluemel v. Freestone*, 2009 UT App. 16, ¶ 5, 202 P.3d 304 (quoting *Downtown Athletic Club v. Horman*, 740 P.2d 275, 278 (Utah Ct. App. 1987)); *Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 840 (Utah Ct. App. 1987)).) Appellants misunderstood or misread the context of the cases cited. In all three instances, the non-moving party had filed a Rule 56(f) motion in opposing the summary judgment. *Bluemel*, 2009 UT App. 15, ¶¶ 3, 5; *Downtown Athletic*, 740 P.2d at 278; *Callioux*, 745 P.2d at 840.

Moreover, fact discovery in this case is complete. (R. 716.) The discovery cutoff came and went in December 2009, and the Appellants have had ample time to perform any discovery needed. The Appellants filed their Complaint on February 27, 2008. (R. 1-50.) More than a year later, in March 2009, the parties agreed to a discovery cutoff deadline of October 1, 2009. (R. 462.) At the Appellants' request, the Appellees stipulated to an extension of the cutoff for discovery until December 1, 2009. (R. 701-

18.) Appellants filed their Motions on about December 23, 2009. (R. 730-33, 753-56.) Possibly the Appellants chose to not file a Rule 56(f) motion because discovery deadline had already passed, so it would have been futile to argue that they needed additional discovery.

Lastly, Appellants assert that the trial court erred in granting the Motions because "the Ceas were awaiting resolution of their motion to compel discovery involving these Respondents which would produce evidence in support of the Ceas factual assertions and arguments." (Applts' at 5.) Yet, not only did the Appellants not file a Rule 56(f) motion, but the Appellants did not move to compel until after the Motions had been fully briefed and submitted for decision. (R. 1434-37, 1499-1538.) Further waiving any argument that the trial court should have considered the motion to compel at the summary judgment motion hearing, Appellants unthinkingly did not submit their motion to compel until a week after the hearing. (R. 1676-79.) The trial court could not consider the concerns now raised when it was never before it via Rule 56(f) or through a submitted motion to compel. This Court should not save Appellants from their fundamental procedural errors, by considering matters not before the trial court at the summary judgment.

III. THE TRIAL COURT'S LEGAL CONCLUSIONS WERE CORRECT.

A. The Court Properly Granted Summary Judgment that there was no Enforceable Guaranty Agreement between Appellants and Appellees.

i. The Letter was Uncertain, Indefinite, and Contemplated a Future Agreement, making it Unenforceable.

The trial court correctly concluded as a matter of law that the Letter did not constitute an offer that could be accepted by the Appellants. The Utah Supreme Court

has repeatedly held that "whether a contract or duty exists is a matter of law." *Harris v. Albrecht*, 2004 UT 13, ¶ 9, 86 P.2d 728; *Flake v. Flake*, 2003 UT 17, ¶ 27, 71 P.3d 589 ("Whether a contract has been formed is ultimately a conclusion of law."); *Nunley v. Westates Casing Servs. Inc.*, 1999 UT 100, ¶ 17, 989 P.2d 1077 (same). The Utah Court of Appeals has similarly held that "[t]he existence of a contract is question of law, to be reviewed for correctness." *McKelvey v. Hamilton*, 2009 UT App. 126, ¶ 17, 211 P.3d 390; *John Deere Co. v. A&H Equip., Inc.*, 876 P.2d 880, 883 (Utah Ct. App. 1994); *see Herm Hughes & Sons v. Quintek*, 834 P.2d 582, 583 (Utah Ct. App. 1992) ("Whether a contract exists between parties is a question of law; therefore, we review the trial court's conclusion of law under a correction of error standard.")

Appellants' sole basis to assess liability against the Appellees is the Letter. (R. 1-47.) In their Complaint, the Ceas contend that the Letter constitutes a valid and enforceable guaranty agreement between the Appellants and Appellees. (R. 13-14.) The trial court correctly concluded that the Letter was not a binding contract. (R. 1685-90.) "A contract of guaranty is governed by the rules of contract law, . . . that is, there must be proper parties with the required capacity, mutual assent, and consideration." *First Nat'l Bank v. Osborne*, 503 P.2d 440, 443 (Utah 1972).

As a matter of law, the Letter is not a valid or enforceable contract because it is too indefinite and uncertain in its terms. (*See* App. 1.) The Letter only expressed the intent that Modular and the Ceas enter into a new and future contract—essentially an agreement to agree. (*Id.*) The Letter is clear that Modular "will be issuing new contracts for your home construction . . . in order to complete . . . a valid contract for

performance." (*Id.*) The Letter further reads, "[If] you decide that you would like to proceed, enter into a new contract and have your home completed." The Letter is unambiguous that Modular "did not acquire [the Ceas's] actual contract from ATC Marketing," and that if they were to go forward, there would be "modifications to terms and payment schedules." (*Id.*)

Accordingly, the trial court correctly concluded that Modular (and certainly Hoffman and Investors) was not promising or guaranteeing performance of the Ceas's Agreement with ATC; instead, Modular was expressing an option that they enter into a "new contract" in the future that would change some of the terms, including payment schedules. (*Id.*) For over eighty years, the Utah Supreme Court has held, "So long as there is any uncertainty or indefiniteness, or future negotiations or considerations to be had between the parties, there is not a completed contract. In fact, there is no contract at all." *Nielsen v. Gold's Gym*, 2003 UT 37, ¶ 12, 78 P.3d 600 (citing *Candland v. Oldroyd*, 248 P. 1101 (Utah 1926) (emphases added); *see also Harris*, 2004 UT 13 at ¶ 10. The trial court correctly concluded that because, at the time of the Letter, there were "uncertainty" and "future negotiations or considerations," then there cannot be a valid or enforceable agreement between the Appellants and the Appellees. (R. 1685-90.)

The case of *Harmon v. Greenwood*, 596 P.2d 636 (Utah 1979), is illustrative. In *Harmon*, the plaintiff asserted that he and his employer had entered into a binding contract forming a business partnership by a letter of intent and oral discussions. 596 P.2d at 637-38. The letter in that case stated that "the undersigned do hereby commit themselves to the intention . . . of entering formal agreements" to form a partnership. *Id.*

at 637. The Utah Supreme Court concluded that the letter of intent was "not by itself an enforceable contract." *Id.* at 639. The Court reasoned that the letter was instead "precisely what it purport[ed] to be, a letter indicating the intention of the parties to enter into, at a later time, a binding agreement." *Id.*

Said another way, a letter indicating an intent to enter into a new contract is not a binding contract because there is not yet a meeting of the minds or an acceptance. *Harris*, 2004 UT 13 at ¶ 10 ("The formation of a contract requires a meeting of the minds.") To create an enforceable contract, "an acceptance must unconditionally assent to all material terms presented in the offer." *Cal Wadsworth Constr. v. City of St. George*, 898 P.2d 1372, 1376 (Utah 1995); *R. J. Daum Constr. Co. v. Child*, 247 P.2d 817, 819 (Utah 1952) (holding that "an acceptance requires manifestation of unconditional agreement to all of the terms of the offer and an intention to be bound thereby.")

In this case, Appellants never unconditionally assented to all the material terms because they did not know, and could not know, what the final terms would be. *See Crimson v. Western Co. North. Am.*, 742 P.2d 1219, 1222 (Utah Ct. App. 1987) (concluding that letter indicating that the parties would enter into a binding contract in the future demonstrated that there was no meeting of the minds and no enforceable contract); *Oberhansly v. Earle*, 572 P.2d 1384, 1386-87 (Utah 1977) (finding that an agreement was unenforceable as ambiguous and uncertain since it was unclear "what the rights of the parties would be under it").

Appellants cite to *O'Hara v. Hall*, a 1981 court case, for the proposition that "where the existence of a contract is the point in issue and the evidence is conflicting or admits more than one inference, it is for the jury to determine whether the contract did in fact exist." (Applts' Br. at 13 (citing 628 P.2d 1289, 1291 (Utah 1981) (emphasis added).) *O'Hara* is inapposite because, in that case, there was external "conflicting evidence" as to whether the writing was a construction agreement or bid a to provide to a lender to obtain a construction loan. 628 P.2d at 1290-91. Here, there is no conflicting evidence because the Letter was the only communication between the Appellants and the Appellees that is at issue. (R. 737-39, 760-62.)

More practically, summary judgment is appropriate because there are no triable issues of fact relative to the Letter. If this Court were to reverse the lower court and remand for a trial, there would be no questions of fact for the jury to decide. The parties all agree that Modular sent the letter, the Ceas received the letter, and this was the only communication they received from the Appellees. Accordingly, there would be nothing for the fact-finder to do because the existence of a contract is a question of law; *Harris*, 2004 UT 13 at ¶ 9; *Flake*, 2003 UT 17 at ¶ 27; *McKelvey*, 2009 UT App. 126 at ¶ 17; and any interpretation of the Letter as a contract would also be a question of law. *Green River Canal v. Thayn*, 2003 UT 50, ¶ 16, 84 P.3d 1134 ("The trial court's interpretation of a contract presents a question of law."); *Nova Cas. Co. v. Able Constr.*, 1999 UT 69, ¶ 6, 983 P.2d 575 ("Interpretation of the terms of a contract is a question of law."); *Watkins v. Ford*, 2010 UT App. 243, 239 P.3d 526 ("The interpretation of a contract normally presents a question of law.") Thus, the matter was ripe for summary judgment.

ii. The Letter is Unenforceable for Lack of Consideration.

Independently, as a matter law, the trial court correctly concluded that the Letter could not be a binding contract because the Ceas offered no consideration for it. "A contract of guarantee is not binding unless supported by consideration." *Bray Lines v. Utah Carriers*, 739 P.2d 1115, 1117 (Utah Ct. App. 1987) (emphasis added). Consideration "is an act or promise given in exchange for the other party's promise." *Healthcare Servs. Group v. Utah Dep't of Health*, 2002 UT 5, ¶ 17, 40 P.3d 591. Here, Investors and Hoffman never sent the Letter, and Modular sent the letter gratuitously. (R. 738, 761, 777.) Modular had no obligation to do so. In exchange for the Letter, the Ceas did not promise or do anything in return. (R. 738, 761, 777.) They merely received it. Without something more, it is unenforceable and non-binding. Thus, any contractual obligations between Appellants and Appellees fail for lack of consideration.

B. The Letter cannot be a Guaranty Agreement by Either Hoffman or Investors under the Statute of Frauds because they did not Sign It.

Although the trial court never reached the issue, even if there were any issue whether the Letter is an enforceable contract as to Modular, which there is none, the Letter cannot be a binding guaranty by Investors of Hoffman because it would violate the statute of frauds as a matter of law. The Utah Code provides that '[t]he following agreements are void unless the agreement . . . is in writing, signed by the party to be charged with the agreement: . . . every promise to answer for the debt, default, or miscarriage of another." UTAH CODE ANN. § 25-5-4 (2011) (emphasis added). Notably, Utah's statute of frauds states that any guaranty obligation is "void," as opposed to

"voidable." There is no dispute that neither Investors nor Hoffman signed the Letter, as the party now charged by the Ceas. (R. 738, 761, 777.) Therefore, any guaranty obligation as to Investors or Hoffman is void and, at best, limited solely to Modular.

C. There was No Fraud or Negligent Misrepresentation as to Guaranty.

i. Since the Letter was not an Enforceable Agreement, then there cannot be a Fraud or Negligent Misrepresentation as to the Letter.

As the Letter fails as a guaranty or other binding contract, *supra*, then none of the Appellees could have committed a "fraud as to guaranty" or "negligent misrepresentation as to guaranty." (R. 14-16.) Simply, if the contract about which Appelltants claim a fraud or misrepresentation does not exist, is unenforceable, and/or is void, then the Ceas's claims are barred for lack of foundation. *See Pride Stables v. Homestead Golf Club, Inc.*, 2003 UT App. 411, ¶ 9, 82 P.3d 198 ("It appears clear that one cannot base a fraud claim on a failure to perform an agreement where the court has found no agreement exists."); *see, c.f., Coroles v. Sabey*, 2003 UT App. 3, ¶ 38, 79 P.3d 974 (holding that if the underlying cause of action is not viable, then the conspiracy claim related to the cause of action must also fail).

ii. The Ceas did not Rely on any Statement in the Letter or Suffer any Damages as a Consequence of Receiving the Letter.

For decades, Utah has required plaintiffs to establish nine elements to prevail on a case for fraud or misrepresentation: (1) a representation; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it;

(6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage. *Dugan v. Jones*, 615 P.2d 1239, 1246 (Utah 1980) (citing *Pace v. Parrish*, 247 P.2d 273 (Utah 1952)). As a matter of law, the Ceas cannot satisfy all of these elements.

Most obviously, the Ceas cannot maintain their fraud or misrepresentation claims because there was no reliance, and they have suffered no injury as a result of the Letter. As presented to the court at summary judgment, the Ceas's damages, if any, were all incurred upon ATC's breach of the ATC Agreement and/or 18 Plus's breach of a certain promissory note to the Ceas, which are at issue against the other defendants in the lawsuit. (R. 1-47; 734-52, 757-74, 829-1033, 1034-1237, 1238-68.) Although the Letter is undated, by reference to ATC's having already ceased operations on November 12, 2006, it is clear that the Letter was prepared and sent after these other defendants had failed to perform their own obligations to the Ceas. (*Compare* R. 1-47, *with* App. 1.) Thus, by the time of the Letter, all of Ceas's damages were fixed. (*See* R. 1-47.) After the Letter, there were not any new damages. (R. 1-47.) In other words, all of the Ceas's damages were caused by other parties, such as ATC or 18 Plus, before Modular interacted with the Ceas (and Investors and Hoffman never interacted with the Ceas).

Likewise, the Appellants cannot identify any reliance on the Letter because their situation and loss remained unchanged from before to after. (R. 1-47; 734-52, 757-74, 829-1033, 1034-1237, 1238-68.) They did nothing new and did not alter their position to their detriment. (R. 737-39, 760-62, 775-77.)

iii. No Fraud or Misrepresentation as to Hoffman or Investors because They Never Made any Representation or Statement to the Ceas.

The court correctly concluded that neither Investors nor Hoffman made any representation whatsoever to the Appellants. (R. 737-39, 760-62, 775-77.) Investors and Hoffman have not made any statements, representations, or averments to the Ceas. (R. 737-39, 760-62, 775-77.) In fact, neither Investors nor Hoffman ever communicated with the Ceas. (R. 737-39, 760-62, 775-77.) Without a representation of some sort, there cannot be fraud or misrepresentation by either Hoffman or Investors a matter of law. *See Dugan v. Jones*, 615 P.2d at 1246.

D. Fundamental Principles of Limited Liability Prevent All Claims Against Investors and Hoffman.

It is a fundamental principal of limited liability companies that "no organizer, member, manager, or employee of a company is personally liable under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of the company or for the acts or omissions of the company." UTAH CODE ANN. § 48-2c-601. Here, the Letter was unequivocally sent by Modular on its letterhead. (R. 777, Appx. 1.) Investors never made any representations or communications of any kind to the Ceas. (R. 737-39, 760-62, 776-79.) It is merely a member-manager of Modular. (R. 737-39, 760-62, 776-79.) Hoffman is even further removed as a shareholder of Nexus, a corporation, which has a membership interest in Investors, or as an officer of Ralen, which is the manager of Investors. (R. 737-39, 760-62, 776-79.) To the extent the Appellants seek to impose liability on Hoffman or Investors as a result of

the Letter (if it were deemed enforceable) these claims fail as a matter of law. Appellants have not raised claims to pierce the corporate veil, for alter ego, or other legal theory that cuts through the shields of limited liability protection, and it is woefully too late to attempt to do so at this point in the lawsuit.

IV. THE MEMORANDA DECISIONS DID NOT VIOLATE EITHER RULE 52(a) OR 56(d) AND APPELLANTS' INVENTED CONCERNS WERE NOT PRESERVED FOR APPEAL.

As set forth above the Statement of Issues, *supra*, Appellants concerns that the Memoranda Decisions did not comply with Rules 52(a) and 56(d) were not properly preserved. Appellants did not file a motion, object, or otherwise raise the issues with the trial court. Therefore, these issues have been waived. *See Tschaggeny*, 2007 UT 37 at ¶ 20; *West One Bank. v. Life Ins. Co.*, 887 P.2d at 882 ("To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits."). Regardless, Appellants'' contentions are without merit.

A. Rule 52(a) Only Requires that a Memorandum Decision Contain "Brief Written Statement" for Summary Judgment and Does Not Require Findings of Facts.

The Memorandum Decisions did not violate Rule 52(a). (Applts' Br. at 20-21.) Appellants contend that the trial courts "failure to comply with Utah R. Civ. P. 52(a) would constitute reversible error" and that the "Memorandum Decisions are substantially lacking detail, analysis, and findings of fact, with little to no mention of the grounds upon which the conclusions were drawn or the law applied in making those conclusions." (Applts' Br. at 21 (arguing that "findings of fact provide a basis on which an appellate

court can review the judgment").) However, Appellants misunderstand when Rule 52(a) applies.

Rule 52(a) expressly sates that "[t]he trial court need not enter findings of fact and conclusions of law in ruling on motions." UTAH R. CIV. P. 52(a) (emphasis added). In fact, in the very case cited by Appellants, *Dover Elevator Co. v. Hill Mangum Inv.*, (Applts' Br. at 20-21), the Utah Court of Appeals stated that "[f]indings and conclusions are ordinarily not required where a case is resolved on motion." 766 P.2d 424, 426 fn. 4 (Utah Ct. App. 1988) (emphasis added). Moreover, in *Dover*, the appellate court refused to reverse because "trial court's failure to fully comply with Utah R. Civ. P. 52(a) and articulate conclusions of law, although perhaps technically incorrect, does not amount to prejudicial error and therefore does not require reversal." *Id.* at 427.

To the contrary, the trial court fully complied with Rule 52(a) in issuing the Memorandum Decisions. For summary judgment motions, the trial court is required only to "issue a brief written statement of the ground for its decision." UTAH R. CIV. P. 52(a) (emphasis added). The Memorandum Decisions satisfies this rudimentary requirement.

For example, with respect to the Modular/Investors motion, the trial court stated that "[t]here was no dispute as material facts" and that the Letter "is not an agreement." (R. 1686.) The trial court explained as its basis for its conclusion that the Letter "is too indefinite and uncertain in [its] terms" and that "[i]t just provides an option to enter into a new contract in the future." (R. 1686-87.) The trial court's written decision explains that the Appellants provided "no evidence that these defendants made any representation to

the Plaintiffs that were fraudulent or negligent" and that Investors "made no statements to Plaintiffs." (R. 1683.)

Likewise, with respect to the Hoffman motion for summary judgment, the trial court explained in its written decision that the Letter "is not an agreement or guarantee" because it "contemplates that future contracts will be issued" and that "[i]t lacks any consideration." (R. 1685-86.) The trial court also concluded that there was "no evidence of fraud or misrepresentation" because "Hoffman never spoke to Plaintiffs or communicated with Plaintiffs." (R. 1685.) Although the Memorandum Decisions may not qualify as a dissertation or treatise, they certainly suit the Rule's requirement for a "brief written statement of the ground for its decision." UTAH R. CIV. P. 52(a).

B. The Memorandum Decisions did not Violate Rule 56(d).

Appellants claim that it is reversible error for the Memorandum Decisions to "not specify the facts that are not controverted." (Applts' Br. at 20.) Appellants reach to have this Court overturn the trial court on this trivial basis. Rule 56(d) reads:

> If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

UTAH R. CIV. P. 56(d) (emphasis added).

Listing the facts that are not controverted under Rule 56(d) is not an absolute mandate or reversible error. The rule expressly states that the trial court specify the facts that appear without substantial controversy "if practicable." (*Id.*) The underlying purpose behind this Rule 56(d) is manifest in the last line: "Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly." (*Id.*)

In other words, if summary judgment is not rendered upon the whole case and a trial is necessary, Rule 56(d) serves as a shortcut to identify those facts that are not controverted for trial. However, it is wholly inapplicable here because the facts and claims against the Appellees are unique and have no bearing on the remaining parties to the lawsuit. (*See* R. 1-47.) Therefore, it was not practicable for the trial court to set forth what facts are not controverted, and there is certainly no harm or prejudice to the Ceas or any other parties remaining in the litigation. *See Gorostieta v. Parkinson*, 2000 UT 99, ¶ 3, 17 P.3d 1110 (holding that a ruling is not reversible error "unless the error is harmful and prejudicial"); *Scudder v. Kennecott Copper Corp*, 886 P.2d 48, 50 (Utah 1994) ("To require reversal, error must be substantial and prejudicial in the sense that there is a reasonable likelihood that in its absence there would have been a different result."); *Nielsen v. Spencer*, 2008 UT App. 375, ¶ 29, 196 P.3d 616 (holding to the extent there was an error, it was not prejudicial and does not require reversal). It was sufficient for the trial court to state that "[t]here is no dispute as to material facts." (R. 1683)

V. THE ORDERS DID NOT VIOLATE RULE 7(f)(2) FOR FAILURE TO CONFORM TO THE MEMORANDUM DECISIONS.

The Orders, as signed and entered by the trial court, fully complied with Rule 7(f)(2). The rule provides as follows:

> Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

UTAH R. CIV. P. 7(f)(2) (emphasis added). Appellants complain that the trial court violated Rule 7(f)(2) because the Orders "do not conform to the court's Memorandum Decisions." (Brief at 21). However, this contention is a red herring.

First, Rule 7(f)(2) is an instruction to counsel for preparing and submitting orders to the court. It requires counsel to prepare the "proposed order in conformity with the court's decision." UTAH R. CIV. P. 7(f)(2). It also describes the process of circulating the proposed order and—if there is a disagreement—how counsel should file an objection and submit the papers to the court. (*Id.*) The Rule alone is not a basis to reverse the trial court's order, in particular after it has been reviewed and signed by the trial judge.

Second, Appellants assert that the Orders violated Rule 7(f)(2) because many of the facts listed in the Orders were not "undisputed." (Applts' Br. at 21-22.) For example, Appellants claim that the fact that "Investors never made any representations to the Ceas," that "Hoffman never made any personal representations to the Ceas," and the "the facts regarding the 'content and issuance' of the Letter" are disputed. (Applts' Br. at 22.)

Yet, they do not (and cannot) cite to any evidence in the record that contradicts these statements. (Applts' Br. at 22.) Appellants should have brought forth any evidence to contradict these facts at the summary proceeding or file a Rule 56(f) motion if they needed the discovery. They did not do so. (R. 833-34, 939, 1039, 1138-39.) There is nothing inconsistent about the Orders, the Memorandum Decisions, or the evidence before the trial judge at the summary judgment proceeding.

Third, the Appellants cannot complain about the process in entering the Orders. As the prevailing parties at summary judgment, counsel for the Appellees circulated the order, which drew an objection from the Appellants. (R. 1694-1705, 1729-42.) The proposed order, the objection, and the Appellees response to the objection were submitted to the trial court for review and consideration. (R. 1729-32.) The trial court agreed with certain aspects of the Appellants' objection and struck paragraphs two and three of each of the proposed orders. (R. 1733-42.) Accordingly, to the extent the Orders are somehow not in conformity with the Memorandum Decisions, which they are, the Court ratified and agreed with the statements in the Orders, except as stricken. *See Meagher v. Equity Oil Co.*, 299 P.2d 827, 830 (Utah 1956) (holding that the trial court has the inherent authority to modify its orders or judgments which do not reflect the results of its judgments or as justice requires).

Lastly, the Appellants improperly paint the Appellees as overreaching in the preparation of the proposed orders. On at least three occasions, the Appellants erroneously argue that the proposed orders "included an award of attorney's fees." (Applts' Br. at 6, 9. 22 (emphasis added).) This is patently false. The proposed orders

stated that the Appellees were the prevailing parties and, therefore, entitled to an award of their "costs" under Rule 54(d)(1) and could serve a requests for costs pursuant to Rule 54(d)(2). Neither of the proposed orders said anything about attorneys' fees. (R. 1735, 1740.) Furthermore, the trial court struck this portion of the proposed order, even though costs are always awardable to the prevailing party under Rule 54(d). (R. 1735, 1740; UTAH R. CIV. P. 54(d)(1).) Thus, the trial court listened and readily made some concessions to the Appellants, even an inappropriate one as to costs under Rule 54(d).

CONCLUSION

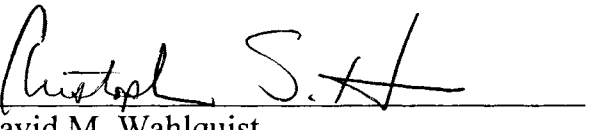
For the foregoing reasons, the judgment in favor of the Appellees should be affirmed.

ORAL ARGUMENT REQUESTED

Oral argument is requested to assist the Court in addressing the factual and legal issues presented on appeal.

DATED this 27th day of April, 2011.

KIRTON & McCONKIE



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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April, 2011, I mailed two true and correct copies of the **BRIEF OF APPELLEES**, postage prepaid, to the following:

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APPENDIX 1

MODULAR MANUFACTURING LLC
2382 N 1500 W Ogden, Ut. 84404 (801)782-7820 Fax (801)782-7587
(801) 394-5647

Dear Valued Customer:

As you may be aware, ATC Marketing, LLC, the owner of American TimberCraft has ceased operations effective November 12, 2006 and has liquidated all company assets. While this move was a difficult decision for ATC, financial reasons dictated that this route was necessary.

As a customer of ATC Marketing we wanted to take a moment and explain how this situation affects you. Obviously with the dissolution and liquidation of ATC Marketing, the company is no longer capable of completing or performing on its contract with you. However, all is not lost.

Modular Manufacturing, LLC has acquired the bulk of ATC assets including plant equipment, all proprietary property and the trade name of "American TimberCraft." Although Modular Manufacturing did not purchase ATC Marketing itself as part of the asset acquisitions, Modular agreed to complete all work in progress, including orders for which deposits have been taken (even if no physical work has commenced). Therefore if you had an order with ATC Marketing, Modular has agreed to complete the work on your home for the previously agreed price, even though it did not acquire your actual contract from ATC Marketing.

At this point in time we (as Modular Manufacturing) will be issuing new contracts for your home construction (regardless of what stage of construction it may be in) in order to complete and give you the assurance of a valid ontract for performance. In lieu of a new contract we will be willing to pay you whatever deposits or payments you ve made to ATC Marketing for your home should you decide that you would prefer to cancel and just walk away. · fully understand your frustration with all the apparent past delays and at this point want to pursue a course most :able to you.

you decide that you would like to proceed, enter into a new contract and have your home completed, there ome minor modifications to terms and payment schedules. However the specifications for the home itself :hange nor will the price.

'ze for any stress or inconvenience this situation may cause, but in the long run we feel that you will be with the results. For one thing we will be able to give you a new and *firm* completion date and will be ·n higher quality assurance and standards.

)ns